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Samuel Silverstone

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OPEN SPACE PRESERVATION THROUGH CONSERVATION EASEMENTS

By SAMUEL SILVERSTONE*

All lawyers are familiar with the traditional uses for which easements have been employed over the centuries. Such uses center mainly around rights which accommodate a dominant tenement in a physical manner such as rights-of-way, rights to support of buildings by adjoining land or buildings, rights to light, rights in connection with water and the like. But is it possible to use the law of easements to accommodate a dominant tenement in a non-physical (or aesthetic) manner? To what extent can this ancient common law device of easement be adapted to modern efforts to preserve open space? Is it possible or feasible to use the law of easements to preserve a scenic view or to prevent one's neighbour from developing his lands?

The precise mechanism under examination here is that which has been variously termed the non-development easement, development easement, scenic easement, open space easement, or conservation easement.¹ Such an easement has been defined as follows:

The owner [servient tenement] retains the right to use and enjoy the land, subject only to the right of the municipality [or other dominant tenement] to keep the land undeveloped; the easement runs with the land, binding all future owners. Compensation is computed by subtracting the value of the land with no possibility of development from the value with development potential.²

Such a right can be adjusted to the parties' desired ends and therefore the term "undeveloped" does not necessarily preclude all forms of development.

Though the conservation easement can be aimed at protecting a view, limiting development, or preserving the aesthetic qualities of undeveloped land, the underlying purpose is the protection and enhancement of open space. Further, the conservation easement is of value in both private and public efforts for open space preservation. The open space thus protected, though not in actual public use, is still of public benefit satisfying the contemporary public's need for open space.

Consider the following hypothetical example: X owns a property overlooking the sea. Y owns a property interposed between the sea and X's property. Nearby are provincial camping grounds. Y is planning to construct a

* Mr. Silverstone is a Lecturer at Osgoode Hall Law School.

¹ Note, *Protection of Environmental Quality in Nonmetropolitan Regions by Limiting Development* (1971), 57 Iowa Law Rev. 126 at 154: "One of the original and foremost advocates of public acquisition of such development rights in private land has characterized the process as the acquisition of a 'conservation easement' after its object of conserving both tangible and intangible environmental amenities."

² Note, *Techniques for Preserving Open Spaces* (1962), 75 Harv. Law. R. 1622 at 1635.

seaside resort. X approaches Y and purchases a conservation easement to benefit X's land (dominant tenement). This easement provides for the preservation of Y's land as an undeveloped natural seacoast property. The cost of such an easement is substantial,³ but is still less than the cost had Y sold X the entire fee simple. Y can still enjoy his property in a limited fashion. Note that the public using the nearby camping ground, also benefits from the private easement between X and Y in that the natural beauty of the general area is preserved.⁴

It is significant that an extensive body of literature on conservation easements presently exists in the U.S.,⁵ whereas Canada lacks any such literature. There has to date been little Canadian research or interest in the use of easements for other than traditional objectives.⁶ The lack of interest in this important device is surprising when one considers its advantages over other techniques for protecting open space (such as purchase or expropriation of the fee).

First, when a municipality purchases or expropriates land for whatever purpose, that land is thereby entirely withdrawn from the tax roll.⁷ Instead, by purchasing or expropriating only a conservation easement over the same property, the tax base is only slightly affected since the land remains on the

³ C. Wilcox, *Aesthetic Considerations in Land Use Planning* (1970), 35 Albany Law Rev. 126 at 143: "The landowner's compensation is the difference between the market value of the property without the easement and its value subject to the easement."

⁴ See Open Space Institute, *Stewardship* (New York: Open Space Institute, 1965) at 66-67: "An open space easement need give no rights of public access to a municipality or any other organization or individual — the property is still private and the attributes of ownership intact, save one: the right to subdivide or otherwise diminish its value as open space What is so new and so hopeful about the idea of open space easements is that everyone is beginning to agree that open space does not have to be in public use to serve a public purpose."

⁵ See for example W. Whyte, *Securing Open Space for Urban America: Conservation Easements* (New York: Urban Land Institute, 1959); Open Space Institute, *supra*, note 4; Comment, *Easements to Preserve Open Space Land* (1971), 1 Ecology Law Q. 728; Comment, *Preserving Rural Land Resources: The California Westside*, *id.* at 330; T. Gose, *Workshop Manual for Conference on Scenic Easements in Action* (Madison, Wisconsin: Univ. of Wisconsin, 1966); Note, *Techniques for Preserving Open Spaces* (1962), 75 Harv. Law R. 1622 at 1635-1637; S. Siegel, *The Law of Open Space* (New York: Regional Plan Assoc., 1960) at 26-30.

⁶ Note that this lack of interest in the easement device in Canada is witnessed by the fact that only two discussions have as yet appeared in the Canadian legal literature on this subject. Furthermore, even these discussions rely heavily upon the U.S. literature on this subject rather than attempting to establish a basis for the device under Canadian common law. See *Recreation Easements*, 1971, No. 129, B.M.R. Comment 1; Ontario, *Niagara Escarpment Study Conservation and Recreation Report* (Toronto: Queen's Printer, 1968) (Gertler Report) at 15-18, 84-87. Note also that there has been mention of the desirability of using the easement device in the Niagara Escarpment Task Force Report of 1972. However, in this report there is no discussion as to exactly how the device would be used or as to whether there is any basis in law for the use of this device. The Task Force does recommend however that "legislation should be passed to make it possible for the Province to purchase easements for appropriate purposes." See Ontario, *Report of the Niagara Escarpment Task Force* (Toronto: Queen's Printer, 1972) at 50.

⁷ See for example The Assessment Act, R.S.O. 1970, c. 32, s. 3.

tax roll (minus the easement value). Second, purchase or expropriation of a conservation or development easement is usually much less expensive than acquisition of the entire fee simple.⁸ This factor is very important for municipalities attempting to accomplish a maximum number of goals on fixed budgets. Third, because there is no transfer of ownership, the government or other dominant tenement escapes the maintenance costs of the property.⁹ Fourth, the conservation easement permits flexibility and can be easily tailored to each particular open space problem.¹⁰ Fifth, the granting of a conservation easement clearly reduces the market value of the servient tenement and consequently reduces the real estate assessment of that property.¹¹ This possibility of a lower property tax may act as an incentive for people to sell or even donate¹² such rights. Finally, the fact that easements are granted for long periods of time and possibly in perpetuity provides a secure medium for open space protection and a control over future unrestricted and unplanned development.¹³

The conservation easement is a relatively inexpensive tool for protection of open space by both public and private sectors. It is a tool grounded in an old and well-established area of the law. The device is beginning to be widely used in many American states. The value of this tool for open space protection is obvious. Why then is such a device not used or even discussed in Canada?

⁸ Comment, *Preserving Rural Land Resources: The California Westside* (1971), 1 Ecology Law Q. 330 at 355: "Easements present cost-saving advantages. They cost less to acquire than a fee interest, they permit the land to be used productively, and the lands involved are not completely removed from the property tax rolls because of public ownership."

⁹ M. Moore, *The Acquisition and Preservation of Open Lands* (1966), 23 Wash. and Lee L. Rev. 274 at 282.

¹⁰ Gose, *supra*, note 5 at 9: "Since one of the chief advantages of easement purchase is flexibility, there is no one standard form. The agreements are tailored to the needs of the landowner and the particular landscape qualities desired to be preserved."

¹¹ Moore, *supra*, note 9; Comment, *supra*, note 8 at 356: "Landowners are more willing to give up the right to develop their land when they are allowed to continue present uses of the land (such as agriculture) while tax pressures that can force an end to farming are removed."

¹² Moore, *supra*, note 11: "The easement approach . . . increases the number of gifts of open lands. Relatively few landowners are wealthy enough or public-spirited enough to donate their land outright, but there are many who can and would give a conservation easement if this led to a reduced tax valuation on the property and enabled them to deduct the value of the easement from their income tax as a charitable gift."

¹³ Comment, *supra*, note 11 at 356: "Easements granted in perpetuity bring planning stability to a developing area that will benefit the developed lands."

Note that it is this element of permanency which causes the writer to prefer the use of the easement to a restrictive covenant here. Though restrictive covenants can admittedly be used to accomplish the same objectives as those of the conservation easement, they lack that attribute of permanency which is characteristic of the easement and which is so important for open space preservation in times of rapid change. This is due to the fact that restrictive covenants can in certain instances be modified or eliminated by a court of law. See for example in this regard: The Conveyancing and Law of Property Act, R.S.O. 1970, c. 85, s. 62(7); The Land Titles Act, R.S.O. 1970, c. 234, s. 129(5); The Land Titles Act, R.S.A. 1970, c. 198, s. 52(3).

To answer this question one must begin by asking yet another question: Is a conservation easement even possible at common law?

Possibility of the Device at Common Law

Though the conservation easement is not found in the traditional lists of easements in various treatises on the subject, a substantial number of authorities assert that the "list of easements is not a closed one".¹⁴ Though there is no clear and precise explanation as to the meaning of this statement, most of the jurists of this view rely upon the four main characteristics of an easement as set forth in *Re Ellenborough Park*¹⁵ to support their position:

The essential qualities of an easement are (1) there must be a dominant and servient tenement; (2) an easement must accommodate the dominant tenement, that is, be connected with its enjoyment and for its benefit; (3) the dominant and servient owners must be different persons; and (4) the right claimed must be capable of forming the subject matter of a grant¹⁶

The notion of a closed or very limited list of easements seems to have finally died with the decision in *Re Ellenborough Park*.¹⁷ The Court, by defining easements in terms of function rather than in terms of rigid categorization,¹⁸ has opened the door for the conservation easement. Although this decision does broaden the scope of the type of rights that can accommodate a dominant tenement,¹⁹ the four essentials of an easement set out there still provide a fairly tight control over what rights may enter. Let us now examine whether there has been any formal recognition of the conservation easement in Canada by way of statute or precedent.

¹⁴ E. Burn, *Cheshire's Modern Law of Real Property* (11th ed. London: Butterworths, 1972) at 509; Anger & Honsberger, *Canadian Law of Real Property* (Toronto: Canada Law Book Co. 1959) at 1009; S. Maurice, *Gale on Easements* (14th ed. London: Sweet & Maxwell, 1972) at 34; A. Conard, *Easement Novelties* (1942), 30 Calif. L. Rev. 125 at 150; 5 *Restatement of Property* ss. 450(e). See also *Dyce v. Lady James Hay* (1852), 1 MacQ. 305 at 312-313, Scots Revised Reports — 9 H.L. Series 299: "The category of servitudes and easements must alter and expand with the changes that take place in the circumstances of mankind." *Simpson v. Mayor of Godmanchester*, [1896] 1 Ch. 214 at 219: "Easements may be of various characters, and it is a fallacy to suppose that every easement must be brought within some particular class which has been recognized"; *A.G. of Southern Nigeria v. Holt & Co. (Liverpool Ltd.)*, [1915] A.C. 599 at 617: "The law must adapt itself to the conditions of modern society and trade, and there is nothing in the purpose for which the easement is claimed inconsistent in principle with a right of easement as such."; *Re Lorne Park* (1913), 18 D.L.R. 595; *Re Ellenborough Park*, [1956] Ch. 11; *Ward v. Kirkland*, [1967] 1 Ch. 194 at 222.

¹⁵, [1956] 1 Ch. 131.

¹⁶ *Id.* at 140.

¹⁷ Note, (1956), 72 The Law Quarterly Rev. 16 at 17: ". . . plainly the case will become one of the leading authorities on the rights which can exist as easements. Though the judgment is long, at bottom the question was really whether there was any technical rule of the law that prevented the court from recognizing as an easement . . . a well-known right not infrequently encountered in practice: and to each suggested objection the ultimate answer was No."

¹⁸ See A. Conard, *supra*, note 14 at 129.

¹⁹ Note, (1955), 71 The Law Quarterly Rev. 324 at 326: "A House which has appurtenant to it a right to enjoy neighbouring pleasure gardens is a better house than one that has not; in the old phrase, such an easement accommodates the dominant tenement."

The most direct reference to the notion of conservation easements is found in section 3(f) of the Recreation Development Act²⁰ of Prince Edward Island:

The Minister shall promote and encourage orderly development of recreation facilities and recreation services in the Province, and for that purpose he may:
... (f) lease or otherwise acquire an easement over any land for the purpose of providing a scenic view . . .

Less direct analogies to the conservation easement are found in section 2(1)(d) of the Public Utilities Easements Act²¹ of Saskatchewan and section 23 of the Roads Act²² of Quebec. Both these provisions permit the government to acquire an easement (or servitude)²³ to limit and/or prohibit building or other objects upon certain defined areas. The dominant tenement in these cases is either the Crown, a public utility company, a railway company, a telegraph company, a gas or oil pipeline company,²⁴ or public highway.²⁵ This notion of a right over another's property restricting his development of that property (development rights) is therefore not unknown in Canada. The use of easements for controlling or restricting development within certain distances of highways comes especially close to the notion of a conservation easement.²⁶

In Canada and the U.S.,²⁷ though there has been no case law bearing directly upon the question of development rights or conservation easements,²⁸ there already exists a body of experience with these easements in various indirect forms.

²⁰ S.P.E.I. 1969, c. 45.

²¹ R.S.S. 1965, c. 124, s. 2(1)(d): "The registered owner of . . . land may grant to the Crown in right of Canada or of the province or to a public utility company, railway company, telegraph company or gas or oil pipe line company . . . (d) the right to remove from the land any building, structure, tree, shrub, bush, hedge, fence or object that might interfere with flying . . ."

²² R.S.Q. 1964, c. 133, s. 23(d): "The Minister may acquire all the perpetual or temporary servitudes which to him appear to be desirable for any built or projected road, and especially . . . (d) The servitude of non-building, prohibiting the erection or rebuilding of any construction on the strip of land specified."

²³ See E. Burn, *supra*, note 14 at 500: "Though servitude is a word that is occasionally adopted by the judges, it is not admitted as a term of art in English Law, and yet it is a suitable expression to denote the particular legal interest which form the subject of this chapter [Easements and Profits]."

²⁴ See, *supra*, note 21.

²⁵ See, *supra*, note 22.

²⁶ Note however that most Canadian provinces use statutory regulations and permit systems instead of easements to control the sides of highways. The end effect of both is the same. See The Highway Improvement Act, R.S.O. 1970, c. 201, s. 35(2); Public Highways Act, R.S.N.S. 1967, c. 248, s. 48; Highway Act, R.S.B.C. 1960, c. 172, s. 43; The Highways Dept. Act, R.S.M. 1970, c. H40, s. 15.

²⁷ Whyte, *supra*, note 5 at 12.

²⁸ Note that it due to this uncertain status of such rights or easements at common law that many U.S. states employ legislation that enables acquisition of such rights. See note, *supra*, note 1 at 154.

One of these forms involves easements prohibiting building or building beyond a certain height on lands surrounding airports.²⁹ A number of explanations have been advanced by the courts as to the basis in law for such easements, but all avoid the central question as to the efficacy of development or conservation easements in either civil or common law. In *Shepherd v. The Queen*³⁰ the use of an easement of *altius non tollendi* is justified by Mr. Justice Dumoulin on the grounds that "an owner of land has a limited right in the air space over the property, such right being limited by what he can possess or occupy for the use and enjoyment of his land."³¹ Another justification for such an easement is offered by Mr. Justice Fournier in *Lacroix v. The Queen*³² where he reasons that:

. . . air and space are not susceptible of ownership and fall in the category of *res omnium communis*, which does not mean that the owner of the soil is deprived of the right of using his land for plantations and constructions . . .³³

In the Quebec case of *Segal v. Ross*³⁴ the court indirectly accepted another form of easement: limitations on a servient tenement as to use and development in favour of a nearby dominant tenement were upheld. These restrictions were said by the court to constitute a perpetual servitude. Like the decisions in the above cases, the judge in *Segal v. Ross* recognized the possibility of an easement or servitude being used to limit or prohibit the development of land, without specifically speaking in terms of development or conservation easements.

Easement of view or prospect

There is one type of right which constitutes a close approximation to the notion of a conservation easement; namely, the easement of view or prospect. If the basis for such an easement can be established at common law, then a solid foundation for the notion of conservation easements can be said to exist. There seems to be a dispute whether an easement of view or prospect even exists. Some common law jurists³⁵ and a substantial body of case law³⁶

²⁹ See *Lacroix v. The Queen*, [1954] Ex. C.R. 69; *Shepherd v. The Queen*, [1964] Ex. C.R. 274.

³⁰, [1964] Ex. C.R. 274.

³¹ *Id.* at 282. See also, [1954] Ex. C.R. 69 at 76.

³², [1954] Ex. C.R. 69.

³³ *Id.* at 76.

³⁴, [1962] R.L. 385 (C.S.) at 404-407. See also *Dupuis v. Dufresne* (1883), 3 D.C.A. 170.

³⁵ S. Maurice, *supra*, note 14 at 26 and 299; 12 *Halsbury's* (3d), para. 1334, p. 614.

³⁶ *Aldred's Case* (1610), 77 E.R. 816 at 821; *Knowles v. Richardson* (1670), 86 E.R. 727; *Arnold v. Jefferson* (1697), 90 E.R. 1174; *Butt v. Imperial Gas Co.* (1866), 2 Ch. App. 158 at 161; *Harris v. DePinna* (1886), 33 Ch. D. 238 at 262; *Squire v. Campbell* (1836), 40 E.R. 451 at 462; *Fishmongers' Co. v. East India Co.* (1752), 21 E.R. 232; *Leech v. Schweder* (1874), 9 Ch. App. 463 at 474; *Browne v. Flower*, [1911] 1 Ch. 219 at 225; *Smith v. Owen* (1866), 14 W.R. 422 (Ch.); *McBean v. Wyllie* (1902), 14 Man L.R. 135 at 139 (K.B.); *Campbell v. Paddington Corp.*, [1911] 1 K.B. 869 at 876; *National Trust v. Midlands Electricity Board*, [1952] 1 Ch. 380 at 385; *Re Corp. of City of Ottawa* (1931), 40 O.W.N. 521; *Phipps v. Pears*, [1964] 2 All. E.R. 35 at 37 (C.A.).

deny its existence; but, an equally large body of case law supports an opposite conclusion.³⁷ So, can it be that the common law does not permit an owner to acquire a view over his neighbour's land by way of easement?

If common law Canada is undecided in this respect, then perhaps some basis for the right to view can be discovered in the civil law. One possible and obvious avenue of exploration would seem to be the civilian concept of "real servitude of view on the property of a neighbour."³⁸ At first glance this servitude seems to be an outright recognition in the civil law of the existence of that which common law courts often deny as an easement of view. However, a careful examination of both civil and common law authorities reveals an important difference in the meaning of the term "view" in these legal systems. When the common law lawyer refers to the notion of right to view or prospect he means a distance as perceived by human vision. That is, the term "view" in the common law is an outlook or unobstructed view³⁹ from one's land⁴⁰ or toward one's land.⁴¹ In the civil law however, a real servitude of view relates not to visual distance (and obstruction of such), but for the most part to unsealed openings or windows overlooking a neighbour's property.⁴² A right of view in civil law is in fact merely a window which can be opened so as to permit the entrance of air (as distinguished from a sealed opening which admits only light). It is because of this civil law definition of view in terms of air access rather than outlook (as is the case

³⁷ *A.G. v. Doughty* (1752), 28 E.R. 290; *Burnham v. Garvey* (1879), 27 Gr. 80; *Scripture v. Reilly* (1891), 14 P.R. 249 at 251 (Div. Ct.); *Brummell v. Wharin* (1866), 12 Gr. 283 at 287-288; *Dalton v. Angus* (1880-81), 6 A.C. 740 at 824; *Western v. MacDermott* (1866), 2 Ch. App. 72 at 73, 75; *Cobb v. Saxby*, [1914] 3 K.B. 822 at 826; *Hunter v. Fox*, [1963] S.C. 481 (Scot.); *Cadwalader v. Bailey* (1891) 17 R.I. 495 at 502, 23 A. 20 (Sup. Ct.); *A.G. v. Vineyard Grove Co.* (1902), 181 Mass. 507 at 509, 64 N.E. 75 (Sup. Jud. Ct.); *Ladd v. Boston* (1890), 151 Mass. 585 at 588, 24 N.E. 858 (Sup. Jud. Ct.); *A.G. v. Abbott* (1891), 154 Mass. 323, 28 N.E. 346 (Sup. Ct.).

³⁸ See French Civil Code, articles 675-680; Quebec Civil Code, articles 533-538.

³⁹ See for example *Phipps v. Pears*, [1964] 2 All E.R. 35 at 37 (C.A.): "Suppose you have a fine view from your house. You have enjoyed the view for many years . . . But if your neighbour choosed to despoil it, . . . you have no redress. There is no such right known to the law as a right to prospect or view."

⁴⁰ See for example *McBean v. Wyllie* (1902), 14 Man. L.R. 135 (K.B.); *Scripture v. Reilly* (1891), 14 P.R. 249 (Div. Ct.).

⁴¹ See for example *Smith v. Owen* (1866), 14 W.R. 422 (Ch.); *Brummell v. Wharin* (1866), 12 Gr. 282 at 287-288.

⁴² This civilian distinction between openings of light (*les jours*) and openings of view (*les vues*) is made clear by the following authorities: M. Planiol et G. Ripert, 3 *Traité Pratique de Droit Civil Français* (Paris: Pichon et Durand-Auzias, 1952) à 892: "Les *vues* sont les ouvertures ordinaires, non fermées ou munies de fenêtre qui s'ouvrent et laissent passer l'air. Les *jours* sont des ouvertures grillées et fermées par un verre dormant, c'est-à-dire ne s'ouvrant jamais; ils peuvent donc servir à clairer une pièce sombre, mais non à l'aérer"; C. Aubry et C. Rau, 2 *Cours de Droit Civil Français* (édition Paris: Marchal, Billard et Cie, 1961) à 290: "Les ouvertures pratiquées dans un bâtiment ou dans un mur peuvent être disposé de manière, soit à donner vue sur le dehors et à laisser pénétrer l'air extérieur, soit à ne permettre que l'entrée du jour. Au premier cas, on les appelle *vues*; au second, on les nomme *jours*." See also *Thibault v. Dame Gourde* (1904), 26 C.S. 185 at 192-193.

in common law) that the civil code provisions⁴³ on servitude of view deal so specifically with allowable distances of such openings from the neighbour's land i.e. six feet for direct views and two feet for oblique views. Consequently, even in civil law, there seems no support for the existence of an easement of view as we are referring to the term.

Let us return to the basic question whether there is an easement of view at common law by an examination of the judicial reasons for *not* allowing such an easement. Many of these reasons, some of which are based upon societal needs and goals of many decades ago, may prove to be no longer justifiable in light of present day realities. The judicial reasoning running through the cases denying the existence of easements of view at common law can be distilled down to three main lines of thought: (1) a view is not a necessity for a tenement; (2) recognition of such an easement would severely limit development of land; and (3) a view is too indefinite a subject matter for a grant.

(1) Over 350 years ago in *Aldred's Case*⁴⁴ a court decided that a prospect was not a necessity but merely a "thing of delight" and therefore not entitled to the protection of the law.⁴⁵ Such an attitude lay undisturbed for several centuries before finally being questioned by Lord Blackburn in the 1881 decision of *Dalton v. Angus*:

The distinction between a right to light and a right of prospect, on the ground that one is a matter of necessity and the other of delight, is to my mind more quaint than satisfactory.⁴⁶

Surely within the last 100 years "a pleasant view" has become an object not only of necessity but of economic value. The increasingly important psychological and ecological values of open space certainly serve to rescue such a "view" from today being relegated to no more than a "thing of delight"!

(2) The fear of limiting the alienability and commercial value of land is an old one. Indeed much of the history of English property law itself is that of an evolution towards greater flexibility and alienability in the use of land. It is understandable therefore that restrictions and limitations upon development in the form of easements of view should have formerly received

⁴³ See, *supra*, note 38.

⁴⁴ *Aldred's Case* (1610), 77 E.R. 816. See also *Knowles v. Richardson* (1670), 86 E.R. 727; *Arnold v. Jefferson* (1697), 90 E.R. 1174; *Fishmonger's Co. v. East India Co.* (1752), 21 E.R. 232; *Squire v. Campbell* (1836), 40 E.R. 451 at 462.

⁴⁵ *Aldred's Case* (1610), 77 E.R. 816 at 821: "[F]or prospect, which is a matter only of delight, and not of necessity, no action lies for stopping thereof, and yet it is a great commendation of a house if it has a long and large prospect, 'unde dicitur, laudaturque domus longos qui prospicit agros.' But the law does not give an action for such things of delight."

⁴⁶ *Dalton v. Angus* (1880-81), 6 A.C. 740 at 824.

harsh treatment by the courts.⁴⁷ And yet, why should there be anything objectionable today about a notion of certain lands being restricted in their development or commercial value? If open space values point towards a definite need to treat land less as a commodity and more as a rare and valuable natural resource, why should not the law of property take full cognizance of such a shift in emphasis?

(3) Perhaps the most powerful and frequently raised objection in the case law to the easement of view is the indefiniteness of such a proposed right.⁴⁸ The basis for this requirement of definiteness and certainty in an interest in land flows from one of the four main essentials of an easement as set forth in *Re Ellenborough Park*: the right claimed must be capable of forming the subject-matter of a grant.⁴⁹ Only a right which can be clearly defined and whose limits are easily discernible fulfills this requirement.

Some degree of definiteness in the scope or extent of an interest is essential to its recognition as a property interest. Some privileges of use of land are quite definite in outline; others are altogether lacking in definiteness When an interest is definite and precise in its extent it is more readily recognized as an entity which can be the subject matter of a conveyance than when it is indefinite. In order that privileges of use may be recognized as easements there must be some degree of definiteness in the privileged use. When a use has not the degree of definiteness necessary to the creation of an easement, the privilege to make it can be nothing more than a license.⁵⁰

Naturally therefore, rights in land hitherto unknown or unfamiliar to the generally accepted (or better known) heads of easements are viewed by the courts with suspicion.⁵¹ Thus the courts have managed to shield the supposedly "open list" of easements from any novel candidates by means of a circular argument. To qualify as an easement a right must have that capacity to be granted. This grantability depends upon the extent of definiteness of such a right.⁵² Furthermore this quality of definiteness is largely based upon

⁴⁷ See *Fishmongers' Co. v. East India Co.* (1752), 21 E.R. 232: "It is true the value of the plaintiff's house may be reduced by rendering the prospect less pleasant, but that is no reason to hinder a man from building on his own ground."; *A.G. v. Doughty* (1752), 28 E.R. 290: "I know no general rule of common law, which warrants that, or says, that building so as to stop another's prospect is a nuisance. Was that the case, there could be no great towns . . ."; *Burnham v. Garvey* (1879), 27 Gr. 80 at 85; *Phipps v. Pears*, [1964] 2 All E.R. 35 at 37-38 (C.A.).

⁴⁸ See *Dalton v. Angus* (1880-81), 6 A.C. 740 at 824: "[T]he right of prospect, which would impose a burden on a very large and indefinite area, should not be allowed to be created, except by actual agreement"; *Harris v. De Pinna* (1886), 33 Ch. D. 238 at 262: "It would be just like amenity of prospect, a subject-matter which is incapable of definition."; *National Trust v. Midlands Electricity Board*, [1952] 1 Ch. 380 at 385.

⁴⁹, [1956] 1 Ch. 131 at 140.

⁵⁰ 5 *Restatement of Property* comment to s. 450(e).

⁵¹ Megarry & Wade, *The Law of Real Property*, (3d ed. London: Stevens & Sons, 1966) at 809.

⁵² Conard, *supra*, note 18 at 143: "The rules about novelty and grantability have been distilled to a residue which consists chiefly of certain legal incidents — definiteness of dominant and servient owners of scope and of duration, completeness of judicial protection, appurtenancy."

the extent to which the right is "well known" or "not unusual" in law.⁵³ However, a right will only be well known in law if permitted by a court to constitute the subject matter of a grant.⁵⁴ It is only then that this right can be exercised often enough so as to become familiar and acceptable.

The result of this circular reasoning is that the court has refused to recognize certain rights as easements although they clearly benefit a dominant tenement — basically because of their novelty.⁵⁵ The courts have used legal fictions⁵⁶ in order to control the number of negative easements permitted recognition at common law.⁵⁷ The underlying fear has been the creation of numerous burdens limiting the commercial value of land.⁵⁸

There exists no reason why rights of view cannot be drawn with sufficient precision and definiteness as to nature, scope, duration and function so as to be acceptable as an easement before the courts. By careful analysis⁵⁹ and drafting⁶⁰ each easement of view (or conservation easement) could quite conceivably be drawn as clearly and narrowly as that of a right-of-way. Because the benefit of a view or of undeveloped natural areas are not as easily valued, categorized, quantified and delimited as other rights does not mean that such a process is impossible — only that more time and effort must be expended to do so.⁶¹ The precision of definition which results from such efforts may not be sufficient to support a prescriptive claim to an easement of

⁵³ See *Leech v. Schweder* (1874), 9 Ch. App. 463 at 474; *Phipps v. Pears*, [1964] 2 All E.R. 35 at 38 (C.A.).

⁵⁴ Conard, *supra*, note 52 at 137: "The rule of grantability proves to serve a number of diverse functions. It is an ambiguous way of stating the perfectly proper principle that incidents of an easement must be definite. It may also serve as a very improper mask for condemning an easement that is merely new or unfamiliar. It may be mentioned as a completely meaningless criterion for distinguishing 'easements' from 'covenants'."

⁵⁵ See *Phipps v. Pears*, [1964] 2 All E.R. 35 at 38 (C.A.): ". . . [T]he right or advantage must be one which is known to the law, in this sense, that it is capable of being granted at law so as to be binding on all successors in title A fine view . . . may be an 'advantage' to a house, but it would not pass Whereas a right to use a coal shed or to go along a passage would pass The reason being that these last are rights known to the law, whereas the others are not."

⁵⁶ Conard, *supra*, note 54 at 137; Note, (1964), 80 The Law Quarterly Rev. 318 at 319-321.

⁵⁷, [1964] All E.R. 35 at 37 (C.A.). See also Maurice, *supra*, note 14 at 34.

⁵⁸ See Burn, *supra*, note 14 at 510; Maurice, *supra*, note 14 at 25.

⁵⁹ Numerous techniques currently exist for analysing and delimiting the actual visual and physical elements of scenic easements. See, Gose, *supra*, note 5 at 1-5.

⁶⁰ The covenants could be drawn in such a fashion as to avoid the pitfalls of vagueness and uncertainty. See *National Trust v. Midlands Electricity Board*, [1952] 1 Ch. 380 at 384-385 (C.A.), where the Court voided for uncertainty the following covenant: "No act or thing shall be done or placed or permitted to remain upon the land, which shall injure prejudice affect or destroy the natural aspect and condition of the land except as hereinafter provided."

⁶¹ How and why does one arrive at a price of \$50,000 for a Picasso or \$100,000 for a Rembrandt?

view, but should certainly fulfill the requirements of subject-matter for grantability.⁶²

Impediments to the use of conservation easements

Though there may exist a legal basis for the conservation easement in Canada, a number of impediments cloud the path towards the actual implementation of this device.

Cost factor: As in any acquisition scheme, even those involving only interests in land and not the entire fee, there is a cost factor. The costs of a conservation easement are much lower than that of the entire fee as long as the land involved is not in serious demand. The device is most effective and least expensive when used as a preventive rather than remedial tool for protecting open space.⁶³ Furthermore, despite the fact that the property involved remains on the municipal tax roll when the conservation easement is acquired by a government body, there is still a reduced real estate assessment which in turn means reduced tax revenues for the municipality.⁶⁴ The costs to the government body holding the easement of administration and enforcement must also be carefully considered⁶⁵ since such responsibilities may have to be carried out for long time periods (and possibly in perpetuity).

Unfamiliarity of device: Another impediment exists in that government bodies, conservation organizations and the public in general are unfamiliar with the conservation easement as a device for open space protection.⁶⁶ This lack of knowledge creates a reluctance on the part of these groups to use the device.

⁶² This view has already been accepted by several courts. See *A.G. v. Doughty* (1752), 28 E.R. 290; *Scripture v. Reilly* (1891), 14 P.R. 249 (Div.Ct.) at 251; *Dalton v. Angus* (1880-81), 6 A.C. 740 at 824; *A.G. v. Vineyard Grove Co.* (1902), 181 Mass. 507 at 509, 64 N.E. 75 (Sup.Jud.Ct.); *Ladd v. Boston* (1890), 151 Mass. 585 at 588, 24 N.E. 858 (Sup.Jud.Ct.); *Cadwalader v. Bailey* (1891), 17 R.I. 495 at 502, 23 A. 20 (Sup.Ct.). See also Maurice, *supra*, note 13 at 33.

⁶³ S. Weissburg, "Legal Alternatives to Police Power" in F. Herring, ed., *Open Space and the Law* (Berkeley: Institute of Governmental Studies, University of California, 1965) 31 at 46; Note, *Techniques for Preserving Open Spaces* (1962), 75 Harv. L. Rev. 1622 at 1637: "To wait until development was imminent would be to destroy the entire benefit of the development easement approach, for the cost of a partial taking would then be almost as much as the cost of acquiring the entire fee."

⁶⁴ For real estate assessment purposes an easement is considered part (value added) of the dominant tenement. See Assessment Act, R.S.O. 1970, c. 32, s. 12(1). See also Whyte, *supra*, note 5 at 43: "... an intelligently planned open space program will not hurt the community's tax base. It is true that the landowners who have given up their rights should not be taxed at the going market value for surrounding land available for development, but let it be noted that, if they don't pay the higher rate, it is because they will not saddle the community with the demand for new services."

⁶⁵ Comment, *Easements to Preserve Open Space Land* (1971), 1 Ecology Law Q. 728 at 740.

⁶⁶ *Id.* at 737.

Few landowners are prepared to grant restrictions of such magnitude⁶⁷ on their property when they understand neither the exact mechanism nor the full consequences of its operation.⁶⁸ This ignorance can be dispelled through educational programs designed to fully explain the purpose and nature of the conservation easement.

Valuation problem: Acquisition of property or interests in property, whether by donation, expropriation or purchase, always requires an exact pecuniary value to be placed upon the object of the acquisition. An objection frequently raised to the conservation easement is that of the difficulty encountered in its accurate and precise valuation.⁶⁹ This presents yet another impediment to its use. However, the same argument could easily be raised in regards to the valuation of any easement. For example, how does one arrive at a "price" for a right-of-way or the right to use a lavatory?⁷⁰ Nevertheless, the fact remains that a conservation easement clearly limits the full development potential of the servient tenement. Such a limitation must be translated into dollars — an especially difficult task in times of rapidly fluctuating land values. The answer to this question is closely tied to that of the degree of familiarity on the part of the public with this device. Numerous techniques of real estate assessment presently exist and can be easily adapted for the purpose of definition and valuation.

Dominant tenement requirements: The major impediment to successful use of the conservation easement lies in the difficulty of finding a dominant tenement suitable to fulfill the requirements of an easement at common law.⁷¹ It is not enough to merely locate an open space worthy of protection. A property capable of benefitting from preservation of such open space must also exist i.e. a dominant tenement. Only certain properties can in fact be "accommodated" by neighbouring open space or by a view upon or over such spaces. However, the list of potential dominant tenements in any one situation is greatly expanded by the fact that contiguity of dominant and servient tenements is not necessary at common law.⁷²

The largest class of potential dominant tenements is that of the public domain which includes public parks, public recreation areas, public unde-

⁶⁷ Conservation easements severely limit the development potential of land. However, such restrictions over the servient tenement, are not so extensive as to fall into the category of possessory rights, thereby losing the status of an easement. (See Maurice, *supra*, note 14 at 5; *Copeland v. Greenhalf*, [1952] 1 Ch. 488 at 498; *Weeks v. Rogalski*, [1956] O.R. 109 at 117 (C.A.)). No possessory right is obtained by the dominant tenement because the servient tenement owner still retains exclusive use (though not totally unrestricted) of his land.

⁶⁸ Gose, *supra*, note 5 at 7.

⁶⁹ J. Krasnowiecki & A. Strong, *Compensable Regulations for Open Space* (1963), 29 J. of Am. Inst. of Planners 87 at 90.

⁷⁰ *Miller v. Emcer Products, Ltd.*, [1956] Ch. 304.

⁷¹ See *Re Ellenborough Park*, [1956] 1 Ch. 131 at 140; *Vannini v. Public Utilities Commission of Sault St. Marie* (1973), 32 D.L.R. (3d) 661 at 666 (Ont.H.C.).

⁷² *Vannini v. Public Utilities Commission of Sault St. Marie* (1973), 32 D.L.R. (3d) 661 (Ont. H.C.) at 666-667; *Adamson v. Bell Telephone* (1920), 48 O.L.R. 24 (C.A.).

veloped lands, highways and streets, numerous public utility properties and rights-of-way, etc. Especially valuable are linear parks stretching from the city into the countryside since a substantial band of surrounding area can be protected in this fashion.⁷³ A provincial park can protect several square miles of surrounding land from development (thus creating a buffer zone protecting the natural features and wildlife of the park itself) through the use of this device. Similarly lands close to public highways can be saved as open space, such lands accommodating the dominant tenement by providing scenic views.⁷⁴

Another source of dominant tenements suitable for conservation easements is that of privately owned lands. It is here that non-profit conservation organizations⁷⁵ play an important role.⁷⁶ Such organizations may own no land contiguous or even near to an open space area they may be desirous of protecting. However, they can still serve as dominant tenement for conservation easements over those selected areas by employing the following scheme.⁷⁷ The conservation organization locates an open space area worthy of protection for scenic reasons. It then approaches the owner of that land or any other nearby land which benefits from the open space area concerned and asks to purchase or to receive by gift an "anchor acre" of land to serve as a dominant tenement.⁷⁸ Having thus established itself as a potential dominant tenement, the conservation organization then proceeds to extract from the owner of the open space area (the potential servient tenement) a conservation easement, either by purchase or by gift.⁷⁹ Because the objects

⁷³ See Whyte, *supra*, note 5 at 50.

⁷⁴ Note that highway departments in certain Canadian provinces and in many U.S. states already use scenic easements over private property abutting the highway to keep these areas as open space. (See, *supra*, note 26. See also Siegel, *supra*, note 5 at 29.)

⁷⁵ In Canada see for example: Canadian Wildlife Federation, Federation of Ontario Naturalists, Nature Conservancy of Canada, Algonquin Wildlife League, Nature Canada, The Wilderness Society, The Sierra Club.

⁷⁶ This role goes well beyond merely raising funds and assisting in the acquisition of endangered areas to that of educating the public as to the need for open space areas. This latter function is crucial if landowners are to respond in a positive fashion when approached to sell or donate a conservation easement over their land. See C. Little, *Challenge of the Land* (New York: Pergamon Press, 1968) at 56-66.

⁷⁷ Note that both non-profit conservation organizations and government agencies can undertake this scheme. However there exists the danger with this latter body of a diminution of open space areas in times of economic need or political necessity.

⁷⁸ S. Ells, 4 *Open Space Law: Government's Influence over Land Use Decisions*, (Boston: Metropolitan Area Planning Council, 1969) at 140: "... [C]ause the owner to convey in the same instrument a[n] ... 'anchor acre' to the public or charitable body, and state that it is benefited by the restriction. This 'anchor acre' may be more or less than an acre, but it should not be minute. Its purpose is to satisfy technical requirements of privity of estate and, to provide land to which the restriction can be 'appurtenant' and the benefits attach"

⁷⁹ Whyte, *supra*, note 73 at 36: "A surprising amount of land can be obtained by gifts. Many landowners have bequeathed land to park commissions in their wills and in many cases have been prepared to give the land before their death provided they may enjoy a life estate in it The easement device may greatly enlarge the gift potential. Only a relatively few landowners are wealthy enough, or public spirited enough, to give their land outright, but there is a rather sizable group who could afford to give easement, and would be willing to"

of a conservation organization are consistent with open space values there is little chance of the conservation easement and its "anchor acre" later being sold under pressure by development interests.⁸⁰

In this scheme the conservation organization must rely upon either purchase or donation to acquire conservation easements over private lands. Government agencies however have in addition to these two modes of acquisition the power of expropriation. If a public body has power to expropriate the fee in order to carry out the purposes of a particular act, then why not a segment of the fee for the same purposes?⁸¹ In fact, numerous existing expropriation sections in federal and provincial legislation actually provide for expropriation of partial interests in land.⁸²

Clearly the task of the government body or conservation organization intent on acquiring conservation easements would be greatly simplified by the existence in law of an "easement in gross" (an "easement in gross" is one which benefits a person rather than a dominant tenement. It is termed "gross" because it not attached to a piece of land). Such a device would, for example, enable a conservation organization based in British Columbia and incorporated there as a non-profit group to buy up conservation easements over open space areas scattered throughout Canada. The complexities of an "anchor acre" scheme would be eliminated as would the difficulty of establishing the fact that a particular dominant tenement is truly "benefitted" by a particular open space area. The "easement in gross", by providing this needed flexibility to the conservation easement, would thereby reduce the cost to the group employing it.

Unfortunately, there is no such right as an "easement in gross"⁸³ known to the common law.⁸⁴ However, there is some suggestion found in the old

⁸⁰ See, *supra*, note 77.

⁸¹ Expropriation of development rights in land can be accomplished with or without the existence of a dominant tenement. The latter approach was attempted in a wholesale fashion in England with the *Town and Country Planning Act*, 1947, 10 & 11 Geo. 6, c. 51 (U.K.). (Note that the effect of this Act was subsequently reversed in 1954 by the *Town and Country Planning Act*, 1954, 2 & 3 Eliz. 2, c. 72). See D. Heap, *An Outline of Planning Law* (6th ed. London: Sweet & Maxwell, 1973 at 12.) Under discussion here however is expropriation of conservation easement for which a dominant tenement must exist.

⁸² See for example *National Parks Act*, R.S.C. 1970, c. N-13, s. 6(3); *The Provincial Parks, Protected Areas, Recreation Sites and Antiquities Act*, R.S.S. 1965, c. 54, s. 8; *Park Act*, S.B.C. 1965, c. 31, s. 11(a); *The Expropriation Act*, R.S.S. 1965, c. 56, s. 3; *Expropriation Act*, R.S.C. 1970, c. 16 (1st Supp.), s. 3.

⁸³ Note that an easement in gross is said to exist in the U.S.. However, what the American jurists refer to as an easement in gross is not more than a mere personal right in another's land. (See 28 *C.J.S.*, Easements s. 4, Easements Appurtenant and in Gross at 633 *et seq.*; 25 *Am.Jur.* (2d) Easement and Licenses s. 12, Easements in Gross at 426 *et seq.*). This American phraseology is clearly misleading because by very definition an easement cannot exist separate from the land which it benefits.

⁸⁴ Cheshire, *The Modern Law of Real Property* (10th ed. London: Butterworths, 1967) at 469; Maurice, *supra*, note 35 at 7-8; *Miller v. Tipling* (1918), 43 O.L.R. 88 at 97 (App. Div.).

common law doctrine of dedication⁸⁵ that an easement can exist without a *physical* dominant tenement such as land.⁸⁶ Though dedicated rights, that is, public rights, have at times been termed "public easements", the question as to whether they do in fact constitute the subject matter of an easement remains a controversial one.⁸⁷ Nevertheless, the notion of a "public easement" and the concept that the public at large constitutes the required "technical dominant tenement" suggest an avenue towards a certain degree of flexibility and change in the traditionally rigid definition of dominant tenement in the law of easements. Dedication, or "public easement", is probably the closest the law comes to any notion of an "easement in gross" without altogether destroying the concept of an easement at common law.

Trend towards public control of land use: There has been a general trend away from private control of land use towards public control in the form of planning legislation. The courts are hesitant in allowing private control schemes to be instituted when they know that these are matters properly and more systematically handled by public statute. For this reason courts may feel that conservation easements are attempts by private citizens to carry out land control schemes of a public nature. The courts may further reason that by upholding such schemes they are in fact helping to create a limited form of legislation and thus usurping the function of the legislature. What the courts must be made to understand is that private land-use controls are the only tools available for protecting open space areas until the legislature finally decides to act. For courts to reject private sector tools in anticipation of all encompassing open space legislation is to destroy any stop-gap measures for open space protection which may presently exist and lay the field wide open to the developer and speculator. Unless courts can be encouraged to support such private efforts as conservation easements there may well be no open space left to protect when open space legislation is finally enacted.

In conclusion, though the above described impediments to the conservation easement are not insurmountable, they do present a formidable barrier. Many states in the U.S. have enacted enabling legislation to over-

⁸⁵ Note that this doctrine has been adopted in Canada: *A.G. N.B. ex rel. U.N.B. v. City of Fredericton* (1968), 68 D.L.R. (2d) 45 (N.B.S.C.) at 53; *Re Lorne Park* (1914), 18 D.L.R. 595 (Ont.S.C.).

⁸⁶ A number of American "dedication" cases suggest that the general public can constitute a valid dominant tenement for the purposes of a negative easement. (See *A.G. v. Abbott* (1891), 154 Mass. 323, 28 N.E. 346 (Sup.Ct.); *Lowell v. Boston* (1948), 322 Mass. 709, 79 N.E. (2d) 713 (Sup. Jud. Ct.); *A.G. v. Vineyard Grove* (1902), 181 Mass. 507, 64 N.E. 75 (Sup. Jud. Ct.); *Cadwalader v. Bailey* (1891), 17 R.I. 495, 23 A. 20 (Sup. Ct.); *Foster v. Park Commissioners* (1882), 133 Mass. 326. In *A.G. v. Abbott*, (1891) 154 Mass. 323, there was held to be a dedication of a park to the public with the fee remaining vested in the original owners. On the subject of easement it was stated at 329 that: "The dedication for a park carries only an easement. This easement is not in the town, but it is in the public at large. There may be inconveniences in this doctrine . . . but the doctrine itself has been widely adopted . . ."

⁸⁷ For arguments in the negative see *Rangeley v. Midland Ry. Co.* (1868), 3 L. R. Ch. 306 at 311; E. Armour, *A Treatise on the Law of Real Property* (Toronto: Canada Law Book Co., 1916) at 29-30. For arguments in the affirmative see: *Dovaston v. Payne*, 2 H. Bl. 527; 126 E.R. 684; L. Jones, *A Treatise on the Law of Easements* (New York: Baker, Voorhis & Co., 1898) at 333.

come these difficulties. These carefully drafted statutes⁸⁸ are designed to circumvent the "ambiguities of the common law of easements" by providing a solid legal base for conservation easements.⁸⁹ Compared to Canada and other countries, these enabling statutes account to a large extent for the wider and more extensive use of the conservation easement by government and conservation organizations in the U.S.. Though it can be argued that these statutes are not necessary to enable the use of the conservation easement at common law, and that they serve merely a political function,⁹⁰ it seems clear that much of this legislation manifestly creates flexibility in the traditional dominant tenement requirement for easements⁹¹ and expands the scope of "public purpose" to include conservation easements.⁹² Canada and the provinces, in view of the U.S. experience, should seriously consider some form of enabling legislation in this area.

Incentives for encouraging use of conservation easements

The technical feasibility of the conservation easement is insufficient incentive to encourage its use. The landowner will not grant restrictions over his land unless there is clear and obvious advantage for him in doing so. The motivation of open space preservation, though sufficient for the conservation easement on the part of conservation organizations, may well be insufficient for the private landowner i.e. the servient tenement. However, a number of incentives exist which can be used to encourage landowners to

⁸⁸ See for example West. Calif. Gov't Code s. 51050-51065 (West. Supp. 1973); Md. Ann. Code Art. 66C, s. 357A (1970); N.Y. Gen. Munic. Law s. 247 (McKinney's Supp. 1973-74); Mass. Gen. Laws Ann. ch. 184, s. 26-33 (West Supp. 1973).

⁸⁹ See Note, *Protection of Environmental Quality in Nonmetropolitan Regions by Limiting Development* (1971), 57 Iowa Law Rev. 126 at 154, note 204; Moore, *supra*, note 89 at 284.

⁹⁰ Local governments in the U.S. are hesitant about taking the first step in un-chartered areas of the law and seem to require some sort of reassurance to do so. State enabling legislation provides such support. See Whyte, *supra*, note 75 at 54-56; Moore, *supra*, note 9 at 284.

⁹¹ See for example: Mass. Gen. Laws Ann. ch. 184, §32 (West Supp. 1973): "No conservation restriction, as defined in section thirty-one, held by any governmental body or by a charitable corporation or trust whose purposes include conservation of land or water areas . . . shall be unenforceable on account of lack of privity of estate or contract or lack of benefit to particular land or on account of the benefit being assignable or being assigned to any other governmental body or to any charitable corporation or trust with like purposes, provided (a) in case of a restriction held by a city or town or a commission, authority, or other instrumentality thereof it is approved by the commissioner of natural resources . . . and (b) in case of a restriction held by a charitable corporation or trust it is approved by the mayor, . . . or city manager, and city council, . . . in which the land is situated, and by the commissioner of natural resources . . ."

Such conservation . . . restrictions are interests in land and may be acquired by any governmental body or such charitable corporations or trust which has power to acquire interest in land . . ."

⁹² See for example West Calif. Gov't Code §6950-7001 (1966). Note that the law of eminent domain in the U.S. requires that a taking be for public purpose or benefit. Therefore conservation easements must fulfill this requirement if states are to use the power of eminent domain in their acquisition programs. See also Whyte, *supra*, note 90 at 15-20.

sell or donate conservation easements in their land to responsible bodies. These incentives involve tax benefits and the possibility of the retention of property in its natural state.

Tax benefits: Property, income, and estate tax benefits accrue to the private land owner prepared to grant a conservation easement in his land.

(a) The property tax upon any particular piece of land is based upon the assessed market value⁹³ of that land. The market value of land in turn depends upon the uses to which that land can be put. Land zoned for high-rise development will in most cases bring a higher price than that restricted to cottages. Similarly land with conservation easements attached thereto will be of little or no value to development interests and therefore carry a low market value.⁹⁴

For purposes of real estate assessment, easements of any kind are considered to be attached to the dominant tenement.⁹⁵ Consequently, the assessment value of the easement added to the dominant tenement reduces the assessment value of the servient tenement by an equal amount.⁹⁶ Assuming that the conservation easement is possible at common law, the sale or gift of such an easement by the owner would have the effect of reducing the assessed value of the land (and hence the property tax upon that land.)⁹⁷

Of special importance to the assessment of land subject to a conservation easement is the specified duration of this right. Assessors may be very wary

⁹³ See Assessment Act, R.S.O. 1970, c. 32, s. 27(2): "Subject to subsection 3 [market value of farm lands based upon farm purposes only if sold to another farmer], the market value of land assessed is the amount that the land might be expected to realize if sold in the open market by a willing seller to a willing buyer."

⁹⁴ It is acknowledged however that in time and with a greater public acceptance of open space values there will be a greater demand for undeveloped and conservation easement-protected properties. This increased demand will eventually be reflected in a higher market value being established for these properties with a consequent increase in tax assessments. However the market value thus established will still be lower than that of a similar piece of land under development pressures (see Whyte, *supra*, note 92 at 33-35). Note that according to the above argument the lands surrounding or contiguous to the "protected" land will also rise in value due to a virtual guaranty of perpetual natural beauty on the neighbouring property. See Comment, *Easements to Preserve Open Space Land* (1971), 1 Ecology Law Q. 728 at 737).

⁹⁵ *Reach Co. v. Gosland* (1919), 45 D.L.R. 140 at 144 (Ont.S.C.); *Re B.A. Oil Co.* (1964), 48 D.L.R. (2d) 493 at 497 (Ont.H.C.).

⁹⁶ See for example Assessment Act, R.S.O. 1970, c. 32, s. 12(1): "Where an easement is appurtenant to any land, it shall be assessed in connection with and as part of the land at the added value it gives to the land as the dominant tenement, and the assessment of the land that, as the servient tenement, is subject to the easement shall be reduced accordingly."

⁹⁷ M. Walker, *Land Use and Local Finance* (1962), 29, No. 7-8-9, Tax Policy 3 at 41: "The purchase of conservation easements . . . is not properly a tax expedient. It is a form of land control that is related to the acquisition of land It is frequently mentioned as a tax device, but it has only the tax significance of any other property purchase in that a property owner is not taxable on something he has sold. The wisdom of this policy is a matter to be considered by land use planners, therefore, and not by tax specialists. Taxwise, . . . it is not controversial as are tax deferral, tax exemption, and other tax expedients."

of reducing the assessment of land subject to a conservation easement of brief duration on the grounds that the owner is merely seeking a "temporary tax haven while waiting to make a substantial speculative gain later on."⁹⁸ A conservation easement of long duration or in perpetuity would be sufficient to avert such an inference on the part of the assessors.⁹⁹

(b) Under section 110(1)(a) & (b) of the Income Tax Act¹⁰⁰ a taxpayer may claim a deduction when computing taxable income in respect of amounts¹⁰¹ given as gifts to, *inter alia*, the Crown in right of Canada, the Crown in right of Canadian provinces, Canadian municipalities and a variety of registered Canadian charitable organizations.¹⁰² For donations to the latter two bodies, deductions can not exceed twenty percent of the income of the taxpayer for the year,¹⁰³ whereas deductions for donations made to the Crown (Canada and/or Canadian provinces) are of an unlimited nature for any one year.¹⁰⁴

In this manner, a landowner can donate a conservation easement plus an "anchor acre" to either a conservation organization with charitable status under the Act or the municipality in which the property is located. In the latter situation, an "anchor acre" grant may not be necessary since the municipality may own a park or other property (potential dominant tenements) nearby. In either situation, the donor (servient tenement) is entitled to deduct the value of the gift for income tax purposes (up to twenty percent of his taxable income). Similarly, the donation can be made to the Crown with even greater deductions permitted on the part of the donor.

Should the value of the conservation easement (and possible "anchor acre") exceed the twenty percent allowable deduction for any one year, the donor can arrange a simple timetable with the donee so that the easement can be made to apply in an incremental fashion to the servient tenement each year over a number of years. That is, the donor's property can be divided into five sections for example, with a conservation easement

⁹⁸ Whyte, *supra*, note 94 at 44.

⁹⁹ Note that many of the U.S. statutes on open space and conservation easements provide for a minimum period for such easement. See for example West. Calif. Gov't Code s. 51053 (West. Supp. 1973).

¹⁰⁰ S.C. 1970-71-72, c. 63 as am. by S.C. 1972, c. 9; S.C. 1973, c. 14, 29, 30.

¹⁰¹ S.C. 1970-71-72, c. 63, s. 248(1): "In this Act, . . . 'amount' means money, rights or things expressed in terms of the amount of money or the value in terms of money of the right or thing"

¹⁰² A. Gilmour, *Income Tax Handbook* (23rd ed. Toronto: R. De Boo Ltd., 1973) at 540 speaking about IT-73-11: "A registered Canadian charitable organization is . . . a charitable organization, corporation or trust in Canada as described in paragraph (f), (g) or (h) of subsection 149(1) of the Income Tax Act To qualify under paragraphs (f), (g) or (h) of subsection 149(1) the sole purposes and objects of the organization, corporation or trust must be (a) the relief of poverty, (b) the advancement of religion, (c) the advancement of education, or (d) other purposes of a charitable nature beneficial to the community as a whole." Note that Canadian conservation organizations fall under the last category of this definition of "registered Canadian charitable organizations."

¹⁰³ S.C. 1970-71-72, c. 63, s. 110(1)(a).

¹⁰⁴ S.C. 1970-71-72, c. 63, s. 110(1)(b).

being granted for each segment over a five year period. At the end of five years the entire property of the donor would be subject to an easement (or easements) and the donor will have succeeded in "spreading" the donation over five years so as to maximize the deductibility of this donation under the Income Tax Act.

It is necessary to point out that the Department of National Revenue, Taxation has never been confronted with the above scheme and refuses to acknowledge it for income tax purposes until this scheme is actually attempted by a landowner.¹⁰⁵ This is in clear contrast to the position of the U.S. Internal Revenue Service which has recently made a specific ruling¹⁰⁶ under section 170 of the Internal Revenue Code¹⁰⁷ providing for the charitable status of conservation easements. A similar tax ruling in Canada would go far in providing the needed encouragement to landowners to donate conservation easements.

The danger in such a scheme lies in the fact that landowners with large holdings may begin to donate conservation easements yearly as a system of income tax avoidance. Landowners who may never have considered developing their lands or selling them for development purposes may suddenly begin donating conservation easements so as to reduce or eliminate their taxable incomes. Indeed, the entire scheme may well become an income tax "loophole" with wealthy individuals and corporations purchasing vast amounts of land and then donating conservation easements in these lands. Such a development would clearly cause the tax department a substantial loss in revenues, and this may account for their lack of any provision or ruling in this area. However, a carefully drafted amendment to the Income Tax Act covering the conservation easement scheme could serve to protect the interests of both the landowner and the tax department. The tax department must be made to see that a conservation easement is not only technically feasible at common law and of some monetary value¹⁰⁸ but also that a transfer of value occurs when the easement is donated.

(c) The amount of estate (death) tax payable on the death of an individual¹⁰⁹ depends substantially upon the nature and size of the estate at

¹⁰⁵ Letter from W.I. Linton, Technical Interpretations Divisions, Department of National Revenue, Taxation to S. Silverstone, July 25, 1973.

¹⁰⁶ Revenue Ruling 64-205, 1964-2 Cum. Bull. 62. See also Ells, *supra*, note 7 at 22.

¹⁰⁷ 26 U.S.C.A. s. 170(c) (West, Supp. 1973); 26 C.F.R. s. 1.170-1 (1971).

¹⁰⁸ Note that if municipalities are prepared to place a "value" on conservation easements for property tax purposes, then the federal government could hardly deny the existence of such "value" for income tax purposes.

¹⁰⁹ Note that on Dec. 31, 1971 the federal government vacated the estate and gift tax area leaving it to the provincial governments. All provinces except Prince Edward Island and Alberta have some form of death tax legislation to fill this gap. See Succession Duties Act, R.S.Q. 1964, c. 70, as am.; The Succession Duty Act, R.S.O. 1970, c. 449, as am.; Succession Duty Act, R.S.B.C. 1960, c. 372, as am.; The Succession Duty Act, S.M. 1972, c. 9; The Succession Duty Act, R.S.S. 1965, c. 62 as am.; Death Duties Act, R.S.N. 1952, c. 34 (suspended by S.N. 1962, c. 39); An Act Respecting Succession Duties, S.N.S. 1972, c. 17; Succession Duty Act, S.N.B. 1972, c. 14.

that time. Proper estate planning therefore calls for the deployment of assets of an individual while alive in such a manner as to minimize the impact of these taxes or duties on his death. The conservation easement is one device which can be used to reduce the value of certain real property in the estate, thereby permitting the estate to attract fewer taxes. By granting a conservation easement (either by sale or gift) a landowner reduces the value of his land by the value of the right so granted. For example, if X's land is assessed at \$200,000 and the conservation easement granted at \$150,000, then the value of the interest X retains is only \$50,000. It is only the \$50,000 which forms part of X's estate and it is only this amount which will form part of the asset inventory for estate tax purposes. Furthermore, X's heirs are still able to enjoy the land, within the restrictions of the conservation easement. Had X not granted the conservation easement over his land, his heirs would have had to pay substantial taxes on his death and would possibly have had to sell the land to do so.

Retention of property in natural state: Many landowners wish to use their land in its natural state (country property or farm) and to pass it on for their heirs to enjoy.¹¹⁰ Spiralling land prices and assessment figures are making it more and more difficult to own undeveloped land. The conservation easement is one method of alleviating many of the costs entailed in holding such lands while at the same time allowing the owner and his heirs enjoyment of the property in a manner consistent with open space values. The conservation easement is one of those rare devices which allows a landowner to "have his cake and eat it too".

To conclude, conservation easements can be effective public-private tools for open space preservation. They have the possibility of providing perpetual protection — a feature seldom found in other private sector tools. However, those advocating the use of this device must proceed with caution. Lack of understanding on the part of either landowner or the tax department can shatter the entire scheme and any possibility of its future use. Success of the conservation easement will depend upon the ability of its advocates to convey the following two main principles to the public and governments alike: (1) Conservation easements must be used in a complementary fashion with other open space tools. To rely on this device for all open space protection is to invite disaster.¹¹¹ (2) Justification for the device must be sought in the fact that it saves land and not money.¹¹² Savings are obviously an incentive to its use by both private landowners and government. But, to rely too heavily on this element of savings is to mislead potential users into believing that substantial gains are to be had in every situation. Furthermore, too great a stress on the savings aspect may draw a sharp and undesirable reaction from the tax department.

¹¹⁰ Open Space Institute, *supra*, note 5 at 65.

¹¹¹ W. Whyte, "Conservation Easements: An Overview" in Wisconsin Dept. of Resource Development, ed., *Conservation Easements and Open Space Conference* (Madison, Wiscon.: Dept. of Resource Development, 1961) 3 at 6.

¹¹² *Id.*